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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 792

SAUL I. BIRNBAUM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION

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The Government concedes, not once but on four separate occasions in its brief (pp. 9, 14, 15, 16), that the totality of circumstances of this case are not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts, viz., *"The situation is an unfortunate one, which should provide lessons for the future"* (p. 16). That concession accords with statements made by the District Court (Judge Wyatt) and the Second Circuit that, though they would not afford relief, they might not have acted as the trial court (Judge Cooper) here did (*Amicus* Brief pp. 22-23). In short, everyone has now conceded that an in-

justice has been worked, but no one seems willing to rectify it.

Indeed, the Government has gone beyond conceding that "[t]he situation is an unfortunate one" and that it is "regrettable" that Judge Cooper acted as he did. The Government asserts that this "unfortunate" case "should provide lessons for the future". We agree. However, such lessons cannot be learned simply because the Government concedes their validity and importance in a brief *opposing* the grant of certiorari. Only the archives and the authors of the brief will benefit from such important "lessons". Their validity must be expressed by this Court upon the grant of certiorari and the rectification of this concededly "regrettable" and "unfortunate situation". Indeed, any other action would permit the decisions below to stand as precedential support for the proposition that the trial court acted properly and for the lesson that others can hereafter act similarly.

To avoid confession of error, which its repeated concession clearly warrants (*Saldana* v. *United States*, 365 U.S. 646 (1961)), the Government concludes that this "unfortunate situation" should not be rectified and the lessons of that situation not taught because Birnbaum is a wealthy man. Such argument is an exercise in sophistry.*

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* The Government also concludes that this "unfortunate situation" should not be rectified because Birnbaum stands convicted of a crime with all of its attendant circumstances. Manifestly this "regrettable" and "unfortunate situation" could not have occurred absent such conviction. Equally obvious is the fact that the trial court necessarily had clearly in mind the nature and scope of that crime when at sentencing it initiated the rehabilitation-probation program and certainly when, following sentencing, the trial court twice acquiesced in the continued conduct of such program by Birnbaum and the charities. Indeed, as stated by the trial court at sentencing: "After all, there are varying degrees of iniquity. I do not regard you as beyond recall" (Petition, p. 5, n. 4).

Birnbaum may be a wealthy man; however, neither the charities nor Birnbaum asked Judge Cooper to be "as explicit as he was as to what factors he would consider in exercising his power to reduce sentence" (Gov't Brief p. 15). Judge Cooper unilaterally and explicitly prescribed the course and the charities and Birnbaum faithfully followed that course.* If the Government believed, as it now urges, that that course was an "unfortunate" or "regrettable" one, it should have so stated at sentencing (and it did not), rather than to permit the charities and Birnbaum to embark upon and pursue that course in the expectation that the promised probation would be forthcoming.

For two or three days a week *since May, 1966* (or for a period substantially in excess of the proposed term of imprisonment) Birnbaum has given generously of his time and wealth, and by so doing he has faithfully followed the explicit directions of the trial court. We appear as *amicus curiae* because by his deeds Birnbaum has to this very day continued to demonstrate that he is prepared to perform, as he has performed, those acts which have made him a useful and constructive member of society.

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* Significantly, the Government studiously avoids answering the points made in our main brief that the sentence was invalid unless the course prescribed is viewed as an incident of promised probation and that the failure of the trial court to make findings to support its refusal to honor its promise was a denial of due process. Indeed, having conceded that this situation is "unfortunate" and "regrettable", the Government then studiously avoids coming to grips with the numerous legal defects inherent in that situation. That strategem though, perhaps, tactically sound, does not obviate the fact such legal problems here exist, that important questions are raised meriting the grant of certiorari and that an injustice conceededly has been done which ought to be rectified (and in the process a concededly important lesson taught with respect to the administration of criminal justice in the federal courts).

No one—not Judge Cooper, not the Government, not the Courts below—has at any time found that Birnbaum has not in fact been rehabilitated in precisely the manner prescribed by Judge Cooper.

We agree that *"The situation is an unfortunate one, which should provide lessons for the future."* Hence, certiorari should be granted to rectify that situation and to teach those lessons.

January 7, 1969.

Respectfully submitted,

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